February 2024

Fiduciary Duty

Evidence for the Work and Pensions Committee

ClientEarth

About ClientEarth

ClientEarth is an international non-profit environmental law organisation headquartered in the UK. In the Accountable Finance initiative, we are lawyers focussed on the legal implications of climate change and biodiversity-related financial risks and impacts for market participants, including pension funds.

Introduction

We are aware that the Work and Pensions Select Committee (the 'Committee') is currently accepting evidence relating to fiduciary duty reform and we offer this submission for your consideration.

Our view is that reform is needed because the legal duties of pension scheme trustees are not fully captured by current legislation, and their interpretation therefore requires knowledge and understanding of a range of sources of law.[1] This is leading to uncertainty and a narrow interpretation of investment decision-making duties, resulting in the prioritisation of short-term returns on investment at the expense of proper management of climate risk in the interests of scheme beneficiaries.

We recommend the express inclusion in statute of duties to:

- identify, assess and manage risks to the portfolio as a whole, including systemic risk; and
- identify, assess and manage the impacts of a scheme's investments on the environment and society.

Evidence

1. With respect to how pension schemes take account of climate change risks in their investments, is there a problem that needs fixing?

1.1 Yes. In answering this question, we will set out: (A) what trustees' legal duties require; (B) how current understandings of legal duties differ; and (C) why this is a problem.

A. What trustees' legal duties require

1.2 Pension scheme trustees are bound by decision-making duties in respect of their investment powers, often referred to as 'fiduciary duties', which are founded in case law, statute and regulatory guidance[2]. Climate risk poses a financial risk[3] to pension schemes, making it a critical consideration under each of the three broad pillars of fiduciary duties: duties to exercise the

[1] As noted by the Financial Markets Law Committee (FMLC) in their recent report, *Pension Fund Trustees and Fiduciary Duties: Decision-making in the context of Sustainability and the subject of Climate Change*, at para. 6.3

[2] In this written evidence, we use 'fiduciary duties' to refer to the basket of legal duties to which pension trustees are subject though – in a strict legal sense – these duties are not all fiduciary in nature.

[3] See Department for Work and Pensions, *Governance and Reporting of Climate Change Risk: guidance for trustees of occupational schemes*, June 2021 at para.111; Bank of England *Climate change*, as updated 22 November 2023; and The Network for Greening the Financial System *Climate Scenarios for Central Banks and Supervisors*, September 2022

scheme's investment powers for their **proper purpose**,[4] duties to consider **relevant factors**,[5] and duties to act in accordance with the **prudent person** test,[6] as follows:[7]

1.3 The overarching **proper purpose** of the trustees' investment power is to deliver benefits over the time-horizon of the scheme, in the context of that scheme. Climate change risks, including systemic risk, poses a threat to the scheme's ability to deliver financial benefits, through impacts on the scheme's whole portfolio from the financial system and the economy.

1.4 **Relevant factors** for trustees exercising investment powers include,[8] but are not limited to,[9] financially material factors. Climate risk, including systemic risk, represents a material financial risk, and is therefore a highly relevant factor in the decision-making process for trustees exercising investment powers. Most countries in the world are committed to limiting global warming to 1.5°C in line with the goals of the Paris Agreement, and to reducing global greenhouse gas emissions accordingly. The best way to mitigate systemic risks to the scheme portfolio is to align investments with science-based pathways to limit global warming to 1.5°C. Every incremental increase in global temperature makes climate impacts more severe, catastrophic tipping points more likely[10] and therefore gives rise to increased systemic risk and increased financial risk for the scheme portfolio.

1.5 The **prudent person** test sets out an evolving duty of care and trustees acting within their investment powers should be judged *"by the standards of current portfolio theory, which emphasises the risk level of the entire portfolio."*[11] Trustees should therefore consider an up-to-date analysis of how climate change will affect investments across their portfolio over the short-, medium-, and long-term, including the use of appropriate climate scenarios.[12] Such climate scenarios should demonstrate (qualitatively if not quantitively) the systemic risk to the portfolio.

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[4] This principle stems from the case of *Cowan v Scargill* [1985] 1 Ch 270, as framed in Law Commission report *The Fiduciary Duties of Investment Intermediaries* (LC2014), p. 109, consistent with case law including *Re Courage Group Pension Scheme* [1987] All ER 528 at 538, and *Hillsdown Holdings v Pensions Ombudsman* [1997] 1 All ER 862 at 879 and 880 (Knox J). For contemporary discussion see Lewis, A., Sustainable Investing by Occupational Pension Scheme Trustees: Reframing the Fiduciary Duty, Trust Law International, Vol. 36, No.3 2022

[5] *Edge v Pensions Ombudsman* [2000] Ch 602 at [50] (Chadwick LJ), *Braganza v BP Shipping Ltd* [2015] UKSC 17.

[6] Trustee investment powers must be exercised with the *"care, skill and diligence"* a prudent person would exercise when dealing with investments for someone else for whom they feel morally bound to provide. See *Re Whiteley* (1886) 33 Ch D 347 at 355, as applied in *Cowan v Scargill* at [50], where it was noted that good faith and sincerity are not sufficient: *"Honesty and sincerity are not the same as prudence and reasonableness."* See also Pollard, D, *'The "prudence" test for trustees in pension scheme investment: just a shorthand for "take care"'*, (2021) 34 TLI 215.

[7] This reflects the analysis of fiduciary duties set out in ClientEarth's recent *letter to the UK's 12 largest trust-based pension schemes*, 6 December 2023, at para. 1.

[8] Law Commission report, *The Fiduciary Duties of Investment Intermediaries*, (LC2014)

[9] Lewis, A., *Sustainable Investing by Occupational Pension Scheme Trustees: Reframing the Fiduciary Duty*, Trust Law International, Vol. 36, No.3 2022 at p. 117-118

[10] The World Resources Institute, *Half a Degree and a World Apart: The Difference in Climate Impacts Between 1.5˚C and 2˚C,* 7 October 2018. See also McKay et al. *Exceeding 1.5°C global warming could trigger multiple climate tipping points*, 9 September 2022

[11] *Nestle v National Westminster Bank* (1996) 10 TLI 113 at [21]

[12] Noting that recent studies, including from the Institute and Faculty of Actuaries and the University of Exeter (*The Emperor's New Climate Scenarios*) suggest that pension schemes' climate scenario models underestimate the rate and impacts of climate change, and therefore climate-related systemic and financial risk. Riccardo Rebonato of EDHEC Business School warned in a recent paper (*Asleep at the Wheel? The Risk of Sudden Price Adjustments for Climate Risk*, July 2023) that current security prices do not adequately reflect climate data, creating a systemic risk of price adjustments that will either create a long-term drag on portfolios or take effect suddenly, affecting economic stability.

1.6 Overlaid on these duties, statute and guidance set out explicit requirements for trustees to identify, assess, manage and disclose the physical and transitional risks of climate change.[13]

B. How current understandings of legal duties differ

1.7 There is consensus among legal experts including the Financial Markets Law Committee (FMLC) that the fiduciary duties of pension scheme trustees permit, and in some situations require, investment decision-making to take into account the climate-related risks to the individual investment, the whole portfolio (i.e. across all investee companies)[14] and the wider economy.[15] We agree with this analysis.

1.8 However, this understanding is based not solely on explicit requirements set out in legislation and regulation[16], but in the application of legal principles to a financial system that has changed significantly over recent decades and in respect of a risk (in climate change) that is acknowledged by the Bank of England (amongst many others) to have distinctive elements that present unique challenges and require a strategic approach to financial risk management[17].

1.9 Indeed, while it is widely understood that management of climate-related risks requires management of system level risks[18] and that there is no bright line between risk and impact, current regulation does not set out duties for trustees to:

a) identify, assess and manage **risks** to the **portfolio as a whole**, including **systemic risk**; or

b) identify, assess and manage the **impacts** of a scheme's investments on the environment and society.

1.10 This lack of clarity in relation to legal duties on climate change results in uncertainty for pension scheme trustees and their advisers,[19] some of whom in ClientEarth's experience still construe

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[13] Department for Work and Pensions, op. cit. June 2021, at para. 96

[14] Including: FMLC *Pension Fund Trustees and Fiduciary Duties: Decision-making in the context of Sustainability and the subject of Climate Change*, 6 February 2024, at para. 5.7 and 6.8 III; Lewis, A *Sustainable Investing by Occupational Pension Scheme Trustees: Reframing the Fiduciary Duty*, Trust Law International, Vol. 36, No.3 2022 at p.120; and Stuart O'Brien quoted by Louise Farrand in *Rethinking Fiduciary Duty*, Pensions Expert, 20 December 2023: *"if you ask most pension lawyers who have looked at it in detail, they will say no, the duty is not to maximise risk-adjusted returns, that's too simplistic. If it was that simple, you would struggle to do things like inflation-risk hedging because that might not give you a return at all. You might deplete your assets, but you're doing it for a sensible objective, which is to hedge your interest and inflation rate risk."*

[15] Including: Financial Markets Law Committee (FMLC) op. cit. at para. 6.6; Lewis, A *Sustainable Investing by Occupational Pension Scheme Trustees: Reframing the Fiduciary Duty*, Trust Law International, Vol. 36, No.3 2022 at p.120

[16] FMLC, ibid. at para. 6.3

[17] See Bank of England, *Supervisory Statement 3/19: Enhancing banks' and insurers' approaches to managing the financial risks from climate change,* April 2019, at paragraph 2.5

[18] See for example Department for Work and Pensions, *Governance and Reporting of Climate Change Risk: guidance for trustees of occupational schemes*, June 2021, including at para. 95 and 96, and The Pensions Regulator *DB investment guidance* and *DC investment governance guidance* note that, *"it is up to the trustees to exercise stewardship and ensure, as far as they are able, that this is done through the whole length of the investment chain"* and that this *"is particularly relevant for the management of macroeconomic, systemic risks such as climate change, which cannot be sufficiently hedged through portfolio construction and asset allocation alone.";* Department for Work and Pensions, op. cit. June 2021, at para. 111

[19] FMLC, op. cit., at para. 1.2

trustee duties narrowly in the context of climate change.[20] This construction is not suitable for assessing and managing the wide-ranging and distinctive risks – financial, reputational and legal[21] – posed to schemes by climate change. Nor is it a suitable mechanism for ensuring that the financial system, including pension schemes, plays its part in guiding the transition to net zero.

C. Why this is a problem

1.11 **Climate impacts are increasing** The world has already reached 1.1ºC of warming and climate change impacts (and associated financial risks) are crystallising around the world as weather and climate extremes create widespread adverse impacts and related loss and damage.[22] Impacts on the worst affected areas are expected to have a ripple effect across geographies and economies, from supply chain impacts to mass migration. The impetus to act for investors and governments alike is strong; both to protect value for beneficiaries and to protect against the impacts of climate change on a human level.

1.12 **UK schemes continue to contribute to planetary breakdown** However, despite the science and the consensus amongst experts, UK pension funds continue to invest in high emitting sectors, including providing fresh capital to energy companies through bond investments[23]. Scientific consensus is clear: projected CO_2 emissions from *existing* fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C, with every increment of global warming intensifying multiple and concurrent hazards.[24] Yet schemes continue to facilitate activities that, according to the best available science, will push the world over the threshold of 1.5ºC warming, the target enshrined in the Paris Agreement on Climate Change. It appears likely that this practice is illustrative of schemes' failure to properly manage climate risks. At the very least, investments of this type should be accompanied by robust stewardship using appropriate levers to push companies to transition to net zero, including covenants placing enforceable conditions on investment.[25] However, in ClientEarth's experience, there is little work being done to implement effective engagement and stewardship strategies in fixed income.[26]

1.13 On a practical level, trustees must be supported to consider whether the scheme's portfolio as a whole is best served by their investment decisions. For example, should they continue to provide finance to a small number of companies whose activities will adversely affect the performance of the rest of the portfolio over the time-horizon of the fund, and by implication trustees' ability to

[20] Including in response to ClientEarth's recent letter to pension schemes covered by the Financial Times *ClientEarth issues stark warning to UK pension funds over climate risk*

[21] FMLC sets out these risks in *Pension Fund Trustees and Fiduciary Duties: Decision-making in the context of Sustainability and the subject of Climate Change*, 6 February 2024, at para. 6.2 and 6.8 IV

[22] Widespread and rapid changes are occurring in the atmosphere, ocean and ice caps, while weather and climate extremes in every region across the globe are leading to extensive adverse impacts and related losses and damages to nature and people, as reported in *IPCC AR6 Synthesis Report 2023*, *Observed Changes and Impacts*

[23] While there is a lack of transparency in relation to occupational pension scheme investments but available data, including from Local Government Pension Schemes is indicative: Local Government Chronicle, *LGPS's £10bn fossil fuel investments sparks new divestment call*, 23 February 2021; Friends of the Earth et al., *Polluted Pensions? Clearing the air around UK Pensions and Fossil Fuels*, October 2021. See also Make My Money Matter Fossil Fuels in UK Pensions report (makemymoneymatter.co.uk), June 2023

[24] (see the International Energy Agency's Net Zero Roadmap, the IEA NZE

[25] As explained in our recent *letter to the UK's 12 largest trust-based pension schemes*, at para. 3.2

[26] Including researching the recent TCFD and sustainability reports of the UK's 12 largest trust-based pension schemes in preparation for the letters above.

provide for the retirement of beneficiaries? Should they align returns with real world impact and invest in the projects required for the net zero transition?

2. Is a legal change to the definition of fiduciary duty needed?

2.1 We believe that, due to the lack of clarity set out above, legal change to trustees' duties is needed:

2.1.1 at a minimum, to make clear that pension funds are required to identify, assess and manage climate risk to the portfolio as a whole (including systemic risk); and

2.1.2 ideally, to update the law to include a positive duty for trustees to identify, assess and manage the impact of their investments on the environment and society.

2.2 The reform we set out at paragraph 2.1.1 is a **clarification of existing legal duties** which is needed to dispel the reported uncertainty among pension scheme trustees set out above. We believe that uncertainty alone is sufficient reason for clarification, since it risks inhibiting trustees from managing portfolios in a manner that is both consistent with trustees' legal duties, and with positive real-world outcomes.

2.3 The reform we set out at paragraph 2.1.2 is a necessary **update and refinement of trustees' existing legal duties** to help empower trustees to exercise the proper purpose of their investment power – to deliver benefits over the time-horizon of the scheme – in the context of a legal landscape that is evolving in recognition of increasing climate risk. Such reform would make it clear that trustees should be considering the impacts of their investments on the real world, empowering trustees to see the connections between investments and the world in which beneficiaries live, and play their part in ensuring that those investments support – and do no undermine – a prosperous future. As well as clarifying trustees' duties, this proposed reform would also address the following issues:

2.3.1 **Current regulation falls short of requiring trustees to consider the impact of their investments on the environment and society.** The regulatory regime has understandable developed with a sharp focus on the financial risks to the portfolio arising from investments underperforming. However, the physical, transition and systemic impacts of climate change also create risks to the broader interests of beneficiaries, including their quality of life. It follows that pension scheme trustees exercising their investment powers for their proper purpose should ensure that their decisions reflect the best interests of beneficiaries including factors that are critical to their society and environment.

2.3.2 **UK pension schemes are out of step with schemes across Europe** where 2016 legislation[27] introduced a permissive that enables pension trustees to take in to account the potential long-term impact of investment decisions on environmental, social and governance factors.

2.3.3 **The omission of express regulatory requirements regarding trustees' duties is in contrast to statutory provisions governing company directors' duties** dating back to 2006: under section 172 of the Companies Act 2006, directors must consider the impact of the company's

[27] *Directive 2016/2341 on the activities and supervision of institutions for occupational retirement provision* (widely known as "IORP II") at Article 19(1)(b). Summary by the European Insurance and Occupational Pensions Authority (EIOPA) here.

operations on the community and the environment. While there is debate as to whether these duties go far enough[28], this emphasis on impact remains absent from pensions legislation.

2.3.4 **Updated duties would align with UK Government commitments in relation to the United Nations Guiding Principles on Business and Human Rights (UNGPs).**[29] [30]The Government has adopted the UNGPs and committed to ensure that its policies enable business respect for human rights.[31] Responsibilities extend to pension schemes[32] and have clear links to climate change; the UN has stated that 'States and business enterprises have obligations and responsibilities with respect to climate change, and with respect to the impacts of climate change on human rights'.[33] Relevantly, UN Special Rapporteurs have found that involvement of UK-based financial institutions in the financing of Saudi Aramco, the world's largest crude oil producer, could be in violation of international human rights law and standards.[34] [35] Pension schemes in the UK already have responsibilities to perform due diligence and monitor and mitigate the climate change-related impacts of their investments and, in many cases, steps are already being taken. However this approach is not universal and a human rights-based approach can help trustees to understand their obligations more broadly. Updating legal duties to include consideration of social and environmental impacts would marry well with the Government's own responsibilities in this area.

2.4 Legislative and regulatory reform provides an opportunity to clarify and codify fiduciary duties, drawing together the various elements of the legal duties and updating them to make them relevant to the practical investment decisions facing trustees today, in the context of increasing climate risks and impacts. The legal framework needs to be clarified and updated so that pension scheme trustees are in no doubt as to the need to properly manage the systemic risks to their portfolio as a whole, and the impacts of their investments on environment and society.

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[28] We note proposals for reform, including the Better Business Act which proposes that company law be updated to align businesses' social and environmental impacts with their existing duty to shareholders, See also Slaughter and May, *A bridge to better business: the positive case for updating directors' duties*, 5 September 2022

[29] '*Good Business: Implementing the UN Guiding Principles on Business and Human Rights'*, HM Government, Updated May 2016.

[30] The UN Guiding Principles are a 'soft law' international human rights instrument, unanimously adopted by the UN Human Rights Council in 2011. They are the authoritative global framework to identify, prevent and address adverse human rights impacts related to business enterprises, which include business-related human rights impacts from climate change. They have been relied on by national courts to interpret national law and are set to be incorporated into mandatory legal requirements in the EU in coming years.

[31] '*Good Business: Implementing the UN Guiding Principles on Business and Human Rights*', HM Government, Updated May 2016

[32] See for example, OECD Guidelines for MNEs - Organisation for Economic Co-operation and Development (oecd.org) (various)

[33] *'Information Note on Climate Change and the Guiding Principles on Business and Human Rights'*, Working Group on the issue of human rights and transnational corporations and other business enterprises, United Nations Human Rights Special Procedures, June 2023, para. 5). The UN also states that '[climate change] *impacts directly and indirectly affect all human rights, including the rights to life, food, health and water. The impacts of climate change also exacerbate social and economic inequalities, disproportionately affecting people already in vulnerable situations'* ('Information Note', para 1). See also,

[34] UN Communications were sent to Saudi Aramco and ten international banks and two investment funds which support Saudi Aramco. Communications also went to the governments of the home countries of the companies involved, the governments of: the UK, the USA, Japan and France.

[35] A copy of ClientEarth's September 2023 Complaint to the UN can be found *here*; the consequent UN Communications can be found *here*.

2.5 Many pension schemes do not have dedicated internal legal or stewardship support, so their trustees rely heavily on external advisers. Measures should therefore be explored to ensure that such advisers, including the investment consultants and asset managers who advise on and manage the investment of assets on behalf of trustees, are held to the same fiduciary standards.

What risks might be involved?

2.6 Some stakeholders have warned in the past against the potential for a divestment from parts of the economy that need to transition to providing goods and services in a net-zero economy and the possible creation of a green asset bubble.[36] There may also be an initial risk of uncertainty relating to the scope and/or standing of the new provisions relative to the preceding regulations, guidance, and various other sources of fiduciary duties.

2.7 However, as the financial risks and impacts associated with climate change continue to increase[37], the benefits of change are increasingly likely to outweigh the risks, and can be mitigated with the measures set out below.

How might they be mitigated?

2.8 While government would need to consider possible unintended consequences of the proposed reforms, we would not anticipate unmanageable divestment or green asset bubbles, given that clarity around how climate risks and impacts should be identified, assessed and managed would not be prescriptive for trustees, who would exercise their customary discretion over investment decision-making.

2.9 New provisions might be introduced with a transition period during which government consultation, guidance and information resources can be produced to educate and equip stakeholders. This would support trustees to adapt and avoid any unintentional breaches. Grace periods can also facilitate a smooth transition and help to ensure compliance.

2.10 Educational resources and support should include:

- information on a full range of sustainable investments, including transition products with financing conditional upon transition to a net zero economy; and
- information on the exercise of robust stewardship in the context of the new rules,[38] including guidance on the distinct levers available in equity and fixed income, and how to have an effective escalation strategy that enables investors to fulfil their fiduciary duty in respect of managing the financial risks to the portfolio that result from climate change.

Are there other ways of achieving the same outcomes (such by improving governance, or providing better tools to help trustees ask the right questions and make decisions)?

2.11 In past years, some stakeholders have suggested that no change is needed, as current fiduciary duty requirements do make clear that trustees should take into account financially material

[36] UK Sustainable Investment and Finance Association (UKSIF) CEO, James Alexander, quoted in Pensions Age, *Industry experts torn on need for fiduciary duty review*, 30 June 2021
[37] See for example the IPCC's 2023 Report, IPCC_AR6_SYR_SPM.pdf
[38] For example, an update to The Pensions Regulator *DB investment guidance* and *DC investment governance guidance*

considerations, including environmental, social and governance considerations.[39] However, pension funds continue to invest in high emitting sectors despite the increasing financial risks of climate change,[40] and are expressing doubt about the scope for considering climate in their investment decision-making. Numerous pension schemes are on the record as preferring to engage rather than divest, for example, which we believe is indicative of a failure to fully grapple with the system level risks associated with climate change, and how those risks translate to the provision of debt. Likewise, the Association of Pensions Lawyers, in response to a 2021 call for evidence from the Work and Pensions Committee on pension scheme stewardship and COP26, stated that *'without further clarification in the law it is not clear that this* [trustees acting in a way likely to lead to broader quality of life benefits for scheme beneficiaries] *would be within trustee fiduciary duties'.* The need for improved clarity is evident.

2.12 The resources set out at paragraph 2.10 above are important for providing trustees with practical support. However, such tools add a layer of interpretation rather than the certainty for trustees and their advisers that legislative or regulatory provisions could offer. Similarly, resources like the recent FMLC report provide useful analysis, but not legal certainty.

Conclusion

Current duties require the assessment and management of climate risk,[41] but existing legislation does not provide clarity about what this requires of trustees in practice, in particular in relation to the risk to the whole portfolio, systemic risk and the impact of investments on the environment and society.

There remains widespread interpretation of fiduciary duties with a narrow focus on short-term returns, resulting in investment decisions that contribute to increasing climate risk, compounding the financial, reputational and legal risks to schemes. The distinctive characteristics[42] and "unhedgeable" nature of climate risk,[43] as well as the urgency needed to mitigate the worst impacts (including financial impacts) of climate change, require the certainty and clarity that are unique to legislative and regulatory provisions.

We hope that our submissions are helpful and would welcome the opportunity to discuss them with you should that be of assistance.

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[39] For example, Investment Association director of stewardship and corporate governance, Andrew Ninian, as quoted in Pensions Age, *Industry experts torn on need for fiduciary duty review*, 30 June 2021.
[40] There is a lack of transparency in relation to occupational pension scheme investments but available data, including from Local Government Pension Schemes is indicative that this continues: Local Government Chronicle, *LGPS's £10bn fossil fuel investments sparks new divestment call*, 23 February 2021; Friends of the Earth et al., *Polluted Pensions? Clearing the air around UK Pensions and Fossil Fuels*, October 2021
[41] Department for Work and Pensions, op. cit. June 2021, at para. 96
[42] As acknowledged by financial regulators globally and in the UK. See for example the Pensions Regulator in its *Climate Adaptation report*, October 2021
[43] See the Cambridge Institute for Sustainability Leadership, *Unhedgeable risk: How climate change sentiment impacts investment*, November 2015, at p. 30

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